Supreme Court of the United States.

OCTOBER TERM, 1971.

Nos. 71-1017
71-1026.

MIKE GRAVEL, UNITED STATES SENATOR,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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Petitioner,
v.
MIKE GRAVEL, UNITED STATES SENATOR,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Mike Gravel, United States Senator, petitioner in No. 71-1017 and respondent in No. 71-1026, herein respectfully moves this Court for an order (1) vacating its opinion and

order entered in these causes on June 29, 1972, and (2) granting the petition for rehearing. As grounds for this motion, petitioner states the following:

1. Rehearing should be granted because Mr. Justice Rehnquist improperly participated in the decision of these cases, and his vote was crucial to the outcome.

In the circumstances of these cases, it was entirely improper for Mr. Justice Rehnquist to participate in the decision. It has long been accepted that judges who may so much as appear to have an interest in the outcome of litigation due to their participation in the events involved in the litigation prior to their ascending the Bench should voluntarily disqualify themselves from participation in the decision of such cases. For the most part, American jurists have been careful to avoid even the appearance of impropriety in this regard,[1] and the citizens of the United States have thus been assured that their cases and controversies will be resolved by jurists free from any bias or pre-disposition.

We respectfully submit that Mr. Justice Rehnquist's prior involvement in the subject matter of this litigation, while serving as Assistant Attorney General in charge of the Office of Legal Counsel of the Justice Department, constitutes precisely the kind of situation which mandates disqualification.

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[1] See Canons of Judicial Ethics, adopted by the American Bar Association on July 9, 1924:

> "Canon 4. A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach."

The core of this case, of course, centered around the attempts by a United States Senator to make available to his colleagues and to the public the contents of the so-called "Pentagon Papers." These papers were considered by the Senator to be highly critical of Executive actions with respect to the war in Indochina, and to reveal deception and incompetence on the part of the Executive. Senator Gravel obtained these papers and placed them before his Subcommittee on Buildings and Grounds at a time when several installments of a *New York Times* series based on the Papers had been published, but while proceedings initiated by the Executive to have further publication enjoined were progressing through the courts. And indeed on the very date of the Subcommittee hearing and placement of the Papers in the Subcommittee record, the case was under consideration by this Court, and a temporary restraining order against publication entered by this Court was still in full force and effect. That restraining order, and a possibly adverse decision in the case, were seen by Senator Gravel as potentially depriving his colleagues and constituents of access to the information contained in the Papers. The release of the Papers through senatorial channels by Senator Gravel followed.

Needless to say, Senator Gravel's and the newspapers' views as to the legality and advisability of releasing these Papers differed diametrically from the view held by the President and the Attorney General. In formulating both its policy with respect to release of the Papers, and its strategy for implementing and vindicating its policy, the Executive sought and received the advice and assistance of Mr. Justice Rehnquist in its attempt to suppress this material from being publicly disclosed.

Acting in his capacity as legal advisor to the Justice Department, Mr. Justice (then Assistant Attorney General) Rehnquist prepared a memorandum analyzing the legal

merits of an attempt by the Government to seek an injunction to suppress publication. Such an attempt was in fact thereafter made, resulting in this Court's opinion in *New York Times Company* v. *United States*, and *United States* v. *The Washington Post Company*, 403 U.S. 713 (1971). It is quite likely that Mr. Justice Rehnquist's memorandum significantly affected the Justice Department's decision to proceed in its attempt to obtain an injunction. Mr. Justice Rehnquist testified at his own confirmation hearings that he personally approved and supported the Justice Department's actions:

> "I do not want to leave in anyone's mind the idea that after I had looked at *Near* v. *Minnesota* and read its language that I was in any way opposed to the Government doing what it did, presenting this issue to the court for decision."

Hearings before the Senate Committee on the Judiciary, 92d Cong., 1st Sess., nominations of William H. Rehnquist and Lewis F. Powell, Jr. (1971), at 41. See also *id.* at 38-40.

This degree of involvement in itself is surely sufficient to require disqualification of a justice in a case involving a grand jury investigation of the subsequent release and public disclosure of precisely these documents by Senator Gravel and the press, including the Beacon Press. The matter is further exacerbated by the fact that the party initiating the actions against *The New York Times* and *The Washington Post*, *i.e.*, the Justice Department, is the very party that initiated the grand jury investigation of the Gravel release of the papers. Furthermore, Mr. Justice Rehnquist was in charge of the Office of Legal Counsel of the Department of Justice both when the *Times* litigation was launched and when the Boston grand jury was convened. Counsel for Senator Gravel further has reason to believe, and states on

information and belief, that as Assistant Attorney General, Mr. Justice Rehnquist assigned one of his assistants to work with Robert Mardian, head of the Internal Security Division of the Department of Justice, to investigate all matters related to the release of the Papers and to convene the Boston grand jury.

Moreover, Mr. Justice Rehnquist's involvement in the Pentagon Papers case went even beyond the strict confines of the duties of his position as legal advisor to the Justice Department. When asked about his involvement in the case, Mr. Justice Rehnquist told the Senate Judiciary Committee only of the memorandum which he had prepared and of a strategy conference which he had attended. Hearings, *supra*, at 38-41. Yet an article appeared on June 19, 1971, in *The Washington Post*, stating as follows:

> "Assistant Attorney General William H. Rehnquist, in a telephone call to The Post's executive editor, Benjamin C. Bradlee, asked the paper to discontinue publication of the articles. The department 'respectfully asked us to desist and we respectfully declined' Bradlee said." (Page A12, col. 4.)

When questioned at his confirmation hearings concerning his role in the Justice Department's efforts to prevent publication of the Pentagon Papers, Mr. Justice Rehnquist did not disclose this telephone call and conversation. However, upon being asked specifically to admit or deny this incident by a subsequent letter written by three members of the Judiciary Committee, Mr. Justice Rehnquist replied:

> "At the request of the Attorney General on a date which I believe was Friday, June 18, I telephoned Mr. Ben Bradlee, Executive Editor of *The Washington Post*, and requested on behalf of the Justice Department that the *Post* refrain from further publication of

> these papers. Mr. Bradlee told me that the *Post* would not accede to this request."

Hearings, *suprd*, at 488-489. Some members of the Committee felt that Mr. Justice Rehnquist had been "less than candid" in revealing the magnitude of his involvement in the litigation. See, *e.g.*, *Congressional Record*, S. 20552 (December 3, 1971) and S. 21242 (December 10, 1971).

This personal intervention in the cases, combined with the advice and assistance given to the President and to the Attorney General, necessitates the disqualification of Mr. Justice Rehnquist in these cases, which are so intimately entwined with his past actions and involvements as Assistant Attorney General.

Under these circumstances, Mr. Justice Rehnquist's involvement in the Court's decision of these cases is, we submit most respectfully, entirely unseemly and improper, particularly so in view of the crucial fifth vote supplied by him, a vote which substantially reversed the opinion of the court below.

We therefore respectfully ask the Court to grant this petition for rehearing and to hear the case without the participation of Mr. Justice Rehnquist. We address this motion to the Court, and not to Mr. Justice Rehnquist individually, because, first, it is a request for rehearing which is properly acted upon by the Court and not by a single justice, and second, because the Court as a whole has both the power and the duty to enforce federal statutes with respect to disqualification of justices and to enforce the canons of judicial ethics with respect to its own members.

In earlier times there was some question as to the power of the Court to enforce standards of judicial propriety upon its own members. In *Jewell Ridge Coal Corporation* v. *Local No. 6167, United Mine Workers of America*, 325 U.S. 897 (1945), a petition for rehearing was filed on the ground

that a justice improperly participated and cast the deciding vote. The petition, addressed to the entire Court, was denied without explanation. Justices Jackson and Frankfurter concurred in the denial because they believed that "the complaint is one which cannot properly be addressed to the Court as a whole . . . ." *Ibid.* The concurring justices continued:

> "No statute prescribes grounds upon which a justice of this Court may be disqualified in any case. The Court itself has never undertaken by rule of Court or decision to formulate any uniform practice on the subject." *Ibid.*

Since only two justices concurred in this statement, it was unclear whether the Court's refusal to rehear the *Jewell Ridge* case was based upon the Court's view that it did not have the power to disqualify a justice, or upon the Court's view that the asserted improper conduct of the justice was indeed proper.

In evident response to the uncertainty generated by this controversy, Congress passed a statute, 62 Stat. 908, 28 U.S.C. 455 (June 25, 1948), which sets mandatory standards for the disqualification of judges, including justices of this Court. That statute provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

It is clear without doubt that this statute is mandatory in nature and leaves the matter of disqualification to the

"opinion" of the justice involved *only* in situations where he "is so related to or connected with any party or his attorney as to render it improper . . . for him to sit on the trial, appeal, or other proceeding therein." Naturally, in such a case, only the justice involved would be expected to have the most complete and accurate knowledge of the details of his relationship with such party or attorney, and would be expected to act in good faith in deciding whether or not that relationship merited disqualification. But the statute makes it crystal clear that in cases where a justice "has been of counsel" in the case, he "shall disqualify himself." There can be no dispute that Mr. Justice Rehnquist acted of counsel to the chief litigant in all of the "Pentagon Papers cases."[2] For lower court decisions construing the term "of counsel" in similar cases, see *United States* v. *Amerine*, 411 F. 2d 1130 (6th Cir. 1969); *United States* v. *Vasilick*, 160 F. 2d 631 (3d Cir. 1947) ("But where, as here, a judge of a district court has been of counsel for a party in the case pending before him, his disqualification is not a matter for the exercise of his own discretion but is unconditional and absolute." 160 F. 2d at 632).

There is no reason to believe that this Court lacks the power to enforce Section 455 in an appropriate case. Other

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[2] Indeed, Mr. Justice Rehnquist virtually conceded as much in the course of the hearings on his nomination. Senator Bayh asked Mr. Justice Rehnquist whether he agreed with the following statement which had been prepared by Mr. Justice White when the latter was in the Department of Justice:

> "From the foregoing, it seems clear that a government attorney is of counsel within the meaning of 28 U.S.C. 455 with respect to any case in which he signed a pleading or a brief, even if it is merely a formal act, and probably should be regarded as of counsel if he actively participated in any case, even though he did not sign any pleading or brief."

Mr. Justice Rehnquist responded: "Well, I concur in that general evaluation." Hearings, *supra*, at 74.

courts of last resort, such as the International Court of Justice, pass upon motions for disqualification of its members. See W. M. Reisman, *Nullity and Revision—The Review and Enforcement of International Judgments and Awards*, 489-517 (Yale University Press, 1971). And surely, for example, were it to be revealed that a justice of this Court had been bribed to cast the deciding vote in a case, manifestly this Court would have no hesitation in refusing to let the opinion stand as the supreme law of the land. Certainly venality is not the only circumstance which can cast doubt upon the propriety and integrity of judicial action.

Inasmuch as Mr. Justice Rehnquist's participation in this litigation was in violation of Section 455 and of the Canons of Judicial Ethics, we respectfully request the Court to grant the petition for rehearing.

2. The Court has decided an issue of momentous importance—that the acquisition of information by a Senator for use in official Senate proceedings is not privileged—which was neither raised, urged, briefed nor argued by any of the parties or by the United States Senate as *amicus curiae*.

The Court decided in a single sentence, without any analysis or explanation, an issue which is of momentous importance in relation to the due functioning of the United States Senate as an informed and co-equal branch of Government, and which issue was neither raised by any party in the cross petitions for writs of certiorari, nor urged at any stage of the case, nor briefed, nor orally argued. The Court held:

> "Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing

the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions."

Slip opinion at 21.

It is important to note that while the Court held that the Senator's "republication" of the Papers did not constitute a "legislative act" within the protection of the Speech or Debate Clause, nevertheless the Court did not hold that the Senator's acquisition of the Papers did not constitute a legislative act. Nor in fact could the Court so hold, since it must be undisputed that the primary reason the Senate has committees is to enable the body, via the committees, to acquire information which is absolutely essential in order to enable the Senate to deliberate intelligently over the important issues of the day and to pass legislation which is found to be necessary.

The Court held that "republication" was not protected because it was "in no way essential to the deliberations of the House. . . . The Senator had conducted his hearings, the record and any report that was forthcoming were available both to his committee and the House." Slip opinion at 19. Clearly, the acquisition of information by a Senator and by his subcommittee is "essential to the deliberations of the House" and is a *sine qua non* to the conduct of the hearings and the preparation of "the record and any report." The necessity of assuring the free flow of information to the Congress cannot be underestimated, for, as Dean Landis has stated: "To deny Congress to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness." Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. Law Rev. 153, 209 (1926). Dean Landis' observations that the deliberative processes of Congress, as well as our system of separation

of powers itself, are dependent upon the ability of legislators to receive, without restraint, information concerning the administration of government, are so self-evident as to be incontrovertible:

> "It needed no argument for Montesquieu to conclude that a knowledge of the practical difficulties of administration was a *sine qua non* of wise legislative activity. But such knowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. The electorate demands a presentation of the case; it requires, even though its comprehension be limited by its capacity, the chaos from which its representative has claimed to have evolved the order that betokens progress. The very fact of representative government thus burdens the legislature with this informing function. Nevertheless its first informing function lies to itself, a necessary corollary of any legislative purpose. Knowledge of the detailed administration of existing laws is not merely permissive to Congress; it is obligatory." *Id.* at 205-206 (footnotes omitted).

Petitioner wishes to emphasize that he need not now necessarily dispute the standard by which Speech or Debate Clause protection should be accorded acts of legislators. While Senator Gravel adheres to the arguments he made before the Court initially, and while Senator Gravel finds absolutely no precedent in either history or case law

for the extraordinarily narrow reading of the Clause given by the Court, *nevertheless even under such a restrictive standard it is eminently clear that neither the Senator, nor his aides nor other parties, may be questioned about the Senator's acquisition of information for a subcommittee hearing.*

As we have noted, *supra,* the very purpose of Congressional committees is to enable the body to acquire needed information. This is evident not only from a practical knowledge of the workings of the legislative branch, but it has been recognized by this Court in *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), where a Senator was held to have engaged in privileged conduct when he issued a subpoena for the production of documentary material and information for his subcommittee. While the subcommittee's counsel was held not protected for unauthorized conspiratorial acts to obtain information in violation of individual rights, 387 U.S. at 84, *Gravel* v. *United States,* slip opinion at 13, nevertheless the Senator, having not been found to be involved in the conspiracy, was held privileged and immune. Certainly within this framework, the mere receipt of material by a Senator, as in the case at bar, with no allegation that he himself, or others at his command, participated in any illegal scheme for acquiring the material, must be considered to fall precisely within the protected area, as was the activity of Senator Eastland. Issuing a subpoena is one common method for a subcommittee to obtain information. Receiving information volunteered by citizens or anyone else is another common method. Indeed, in many instances, a Congressman cannot subpoena material, because he does not know enough to know where, to whom, and with respect to what documents to direct a subpoena. It is only after the receipt of certain threshhold information that is volunteered to him that he knows where to turn; and this applies especially in situations where the Executive attempts to

cover up or misrepresent the facts. For this Court to determine which methods shall and which shall not be used is to embroil the Court in a political thicket, and to strike a blow at a co-equal branch, which can do neither the judiciary nor the legislature any good. It is even doubtful that every Member of the Senate will see fit personally or via his aide to obey a grand jury subpoena where a Senator might feel that he would be compromising the ancient and heretofore undoubted prerogatives of the legislature and of the Sovereign People whom he represents. This is the material of which constitutional crises are made.

The consequences of this holding cannot be overestimated. For example, recent hearings have been held by the Senate Foreign Relations Committee, prompted by information supplied in confidence to the Committee's chairman, which have revealed that the Executive was supporting military operations in Laos and Cambodia in direct violation of statutes passed by the Congress and signed by the President. Is it conceivable that our Constitution permits the Executive, with the aid of the judiciary, to haul the Chairman of the Foreign Relations Committee before a federal grand jury, to interrogate him as to the sources of his information, to throw him in jail if he refuses to cooperate and to threaten him with indictment and prosecution?[3]

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[3] An independent legislative branch should not have to depend upon the good faith of the Executive branch under a system of separation of powers. Furthermore, the comfort apparently derived by this Court from the "fact" that "there is nothing in our history . . . comparable to the imprisonment of a Member of Parliament in the Tower without a hearing." *United States* v. *Brewster*, O.T. 1971, U.S. , 40 L.W. 4996, 4998 (June 29, 1972) should not give similar comfort to Members of the Senate, in view of the historical evidence that this is simply not correct. The kangaroo court which, in 1798, convicted and sentenced Matthew Lyon, a key member of Congress, was motivated purely by partisan political considerations and was accomplished by a biased Federalist judge who would not even allow Lyon time to prepare his

Issues of this magnitude certainly should be decided only upon an adequate record and after full and complete argument by all parties, including the United States Senate. Neither is present in this case. The Solicitor General did not question the holding of the Court of Appeals that the acquisition of the documents by Senator Gravel for use in the subcommittee hearing was privileged. Accordingly, this issue was not argued by either party to the litigation or by the United States Senate. Nor, we hasten to point out, did this Court upon its grant of the cross petitions for writs of certiorari request that this additional issue be briefed and argued.

The question that should be ordered briefed and argued upon a reconsideration of this case is whether the acquisition of information by a Senator, including the receipt of allegedly classified material critical of Executive behavior, is necessary for effective Congressional deliberations and is therefore a constitutionally privileged legislative act.[4]

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defense. See J. M. Smith, *Freedom's Fetters,* 221-241 (1956), and Senator Gravel's brief at 64-67. Similarly, the 1797 grand jury inquisition of Congressmen who criticized the administration's senseless war with France was subject to the judicial "supervision" of another Federalist judge who aptly fits Mr. Justice Harlan's description of "lackeys of the . . . monarchs." *United States* v. *Johnson,* 383 U.S. at 181. See M. Peterson, *Thomas Jefferson and the New Nation,* 605 (1970). It was this grand jury investigation which prompted the memorable protest of Jefferson and Madison. See Senator Gravel's brief at 53-58. Unless the Constitution is construed strictly, there is no guarantee that incidents such as this will not be repeated at other times of political passion.

[4] Clearly, the mere label of "illegal" attached to the acquisition cannot divest the privilege. It is precisely where illegality enters that privilege plays its historic role. For example, the subpoena issued by Senator Eastland in *Dombrowski* v. *Eastland, supra,* was clearly violative of the Fourth Amendment. And, in the context of the legislative process, "receipt of stolen documents" means only that a Senator received the documents and *knew* that they were illegally acquired. This would necessitate the very inquiry into

That question requires full exposition of the realities of the legislative process; it cannot be decided by resort to judicial notice, particularly by judges who have no Congressional experience. Respect for the rights, privileges and obligations of a co-equal branch certainly requires no less than is asked for here.

Should the Petition for Rehearing be granted, Senator Gravel respectfully requests the Court to reconsider the standard governing the Speech or Debate privilege enunciated in the opinion. While we of course agree that "legislative acts" are not all encompassing, the purposes of the privilege can be realized only by including those customary duties of Congressmen which fulfill goals of representative government. This is the manner in which the privilege has always been construed in both this country and in England. Under this consistent standard, publication of legislative proceedings cannot be the subject of Executive and Judicial restraint. That this was the specific intention of the Framers may not be disputed by mere reference to an ill-starred English decision 50 years after the writing of our Constitution; the comprehensive protest of Jefferson and Madison must be given the weight it deserves.

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the motives of a Senator in performing his legislative duties which the Speech or Debate Clause was designed to prevent.

Senator Gravel does not claim here, nor did he claim at any point in his briefs or oral argument, that he or his aides or other parties cannot be subpoenaed or questioned as to whether and under what circumstances the Senator or his delegates were involved as conspirators or principals in the purportedly unlawful theft of classified documents. Inquiries into a theft (*e.g.*, "Did you break into the Pentagon?") differ *toto caelo* from a broad inquiry into receipt and motives. Thus far, the Government has not even hinted that it believes that Senator Gravel was involved in any such theft—for the simple reason that the Government knows that he was not. Should the Government change its mind and wish to pursue allegations of theft by the Senator or persons acting at his command, Senator Gravel would not oppose questioning to that extent, with a protective order assuring these limitations.

Conclusion.

For the foregoing reasons, Senator Gravel respectfully requests this Court to grant this petition for rehearing.

Respectfully submitted,
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ZALKIND & SILVERGLATE,
Of Counsel.

Certificate of Counsel.

I, Robert J. Reinstein, a Member of the Bar of this Court, hereby certify that the within "Petition for Rehearing" is presented in good faith and not for delay.

Dated this 17th day of July, 1972.

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